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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

74-1560

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

AMADO MARTINEZ-FUERTE, ET. AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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On 18 June 1975, a Petition for Writ of Certiorari in the above-entitled case was served on counsel for Respondents. Respondents adopt the material set forth in the petition under the headings "Jurisdiction," "Constitutional Provision Involved," and "Statement of Facts." By a separate motion to strike, Respondents move this Court to strike portions of the Solicitor General's petition for certiorari which contains affidavits and statistics dehors the record and put forward by Border Patrol officers. These materials were never part of the record of any of the cases before this Court.

QUESTION PRESENTED

1. Whether in the absence of probable cause, reasonable suspicion, or a judicially authorized warrant based upon those concepts, Border Patrol officers may lawfully stop any vehicle they choose and interrogate its occupants on Interstate 5, located 66 miles north of the Mexican-American border, and between California's two largest cities, San Diego and Los Angeles?

Once again, the Government seeks to legalize the activities of the Border Patrol at the San Clemente checkpoint located "on the principle highway between San Diego and Los Angeles, and [where] over 10 million vehicles pass. . . in a year." United States v. Martinez-Fuerte, 514 F. 2d 308, 312 (9th Cir. 1975), petition for rehearing en banc denied 17 April 1975. In United States v. Ortiz, 422 U.S. ___ (30 June 1975), this Court recently held that under the Fourth Amendment as interpreted in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the Border Patrol may not, in the absence of consent or probable cause, search private vehicles at traffic checkpoints removed from the border or its functional equivalent. For the purposes of a search, the Court stated in Ortiz that there was no difference between a roving stop and search and such activity performed at a checkpoint.

This Court in Ortiz was "not persuaded that the checkpoint [at San Clemente] limits to any meaningful extent the officer's discretion to select cars for search. . . . It is apparent from these [checkpoint search] figures that checkpoint officers exercise a substantial degree of discretion in deciding which cars to search." (Slip opinion at 5)

In United States v. Brignoni-Ponce, 422 U.S. ___ (30 June 1975), this Court held that the Fourth Amendment does not allow a roving patrol of the Border Patrol to stop a vehicle near the area of the San Clemente checkpoint for the purpose of questioning its occupants about their citizenship and immigration status without a reasonable suspicion based upon specific articulable facts that the vehicle contains aliens illegally in the country. In Brignoni-Ponce, the only articulated basis for the roving stop of the car was that the occupants of the vehicle appeared to be of Mexican ancestry. This was held not to be sufficient to justify a stop based upon the reasonable suspicion rationale.

Recognizing that the border area involves millions of motorists who violate no laws, this Court in Brignoni-Ponce refused to grant the Government the extravagant license to stop for questioning any motorist within 100 miles of the border:

> "In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carrying not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." (Slip opinion at 9)

Brignoni-Ponce effectively limits the exercise of authority by the Border Patrol granted by §§ 287(a)(1) and (3) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(1) and (3) (1970). The Court read into the statute the constitutional standards of reasonable suspicion previously articulated in Terry v. Ohio, 392 U.S. 1 (1968), for street detentions of pedestrians. For purposes of the instant case, it is important to note the Court's concern with the wide degree of arbitrary discretion exercised by the Border Patrol in treating persons differently at checkpoints (Ortiz at 5), and its concern with the potential for harrassment of millions of lawful motorists who are in no way involved in illegal alien activity in the border region (Brignoni-Ponce at 9).

Mr. Justice White's opinion concurring in the judgment in Ortiz and Brignoni-Ponce questioned the lawfulness of selective, causeless checkpoint stops while noting the high costs and low benefits of the Border Patrol efforts to stem the heavy flow of illegal aliens entering this country.

> "The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country. This problem, which ordinary law enforcement has not been able to solve, essentially poses questions of national policy and is chiefly the business of Congress in the Executive Branch rather than the Courts."

The Decision in Martinez-Fuerte

In the instant case, a United States Magistrate on 22 June 1974 issued a "warrant of inspection" which "commanded" the Border Patrol to operate the immigration traffic checkpoint at San Clemente and stop all northbound vehicles for the purpose of making "routine inquiries" to determine the immigration status of the occupants. The respondents were stopped and interrogated at the San Clemente checkpoint pursuant to the "warrant of inspection." The Government concedes that there was neither probable cause nor founded suspicion for the stop, seizure

and interrogations that took place. The Government relies solely upon the inspection warrant to justify these stops and interrogations.

The Ninth Circuit opinion below noted that over ten and one-half million cars pass through the checkpoint each year. "The overwhelming majority of persons travelling north through the checkpoint are lawfully within the country; indeed, most of them are not aliens and have not crossed the border at all." Martinez-Fuerte, supra at 312.

Of import in the analysis of the constitutionality of the stop and interrogation procedure at the checkpoint, especially in light of this Court's language in Ortiz and Brignoni, the opinion of the Ninth Circuit demonstrates the wide degree of discretion exercised by officers at the checkpoint in selecting individuals for the interrogation procedure off the highway:

> "The officer at the "point" (between lanes of traffic) surveys the oncoming cars, looking for those which in the border patrol parlance "break the pattern" of the traffic. . . . The agent at the "point" makes a purely discretionary decision whether to wave each auto through the checkpoint after it has slowed or come to a "fleeting stop." Id. If for some reason a vehicle arouses the officer's suspicion, he will divert it to a secondary inspection area where the travellers will be detained for inquiry by other agents into their citizenship and immigration status. [Citations omitted]." Martinez-Fuerte, supra at 313.

Just as this Court noted in Ortiz that the checkpoint did not limit to any meaningful extent the officer's discretion to select cars for search, the Ninth Circuit noted that there was similarly no meaningful limit on the discretion of the "point" officer to select certain cars to be routed off the interstate highway for interrogation by awaiting Border Patrol officers. This unbridled discretion is reflected in the affidavits

and return on the warrant issued below where 145,960 number of cars were subjected to the initial "fleeting stop" and 820 were referred off the road for interrogation of the occupants. In this context, the language of this Court in Ortiz is particularly apt in considering this stop and interrogation procedure:

> "It is apparent from these figures that checkpoint officers exercise a substantial degree of discretion in deciding which cars to search [or stop and interrogate]. The Government maintains that they voluntarily exercise that discretion with restraint and search only vehicles that arouse their suspicion, and it insists that officers should be free of judicial oversight of any kind. Viewed realistically, this position would authorize the Border Patrol to search [or stop, refer off the highway, and interrogate a vehicle's occupants] at random, for no officer would ever have to justify his decision to search [or stop, refer off the highway, and interrogate occupants of] a particular car.
>
> This degree of discretion to search [or stop and refer off the highway] private automobiles is not consistent with the Fourth Amendment." (Ortiz at 5)

As the Ninth Circuit opinion noted, during the period of warrant authorization in the case at bar, an estimated 145,960 vehicles passed through the San Clemente checkpoint and were subjected to the "fleeting stop." A point officer scanned each vehicle for a determination whether or not to refer the vehicle to secondary. Of this total, 820 vehicles were referred to secondary for interrogation regarding nationality and citizenship and only 171 cars were found to contain illegal aliens. "These border patrol statistics reveal that of the 145,960 vehicles passing through the checkpoint, only 171, or 0.12%, were found to contain deportable aliens." Martinez-Fuerte, supra at 314.

Thus, not only is there total unbridled discretion for the point officer to select individuals for referral off the highway and interrogation, but no articulated standard is required for such a selection process. While all of the traffic going through the checkpoint is forced to stop from highway speeds of 55 miles per hour, 1% is further referred to the secondary area where it is subjected to the more intrusive removal from the highway and interrogation. It is also interesting to note that although the Government makes broad claims that the "point" officer is skilled in selecting appropriate vehicles for the secondary examination, the return on the warrant in this case reflects that "the border patrol was 'overzealous' by a factor of nearly five in diverting cars for secondary inspection. Of 820 cars diverted, 649 had no 'illegals' aliens in them." Martinez-Fuerte, supra at 314.

The Ninth Circuit has held that to support a stop at a traffic checkpoint, the officers must have a "founded suspicion" that the occupants in the vehicle may be in the United States illegally. United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974). The issue in Martinez-Fuerte before the Court below was whether the "warrant of inspection" somehow transformed otherwise unreasonable stops and seizures into constitutional ones. Id. at 315. Relying upon this Court's decisions in Almeida-Sanchez, supra, and Carroll v. United States, 267 U.S. 132 (1925), the Ninth Circuit held that federal agents cannot constitutionally stop automobiles systematically or randomly on the mere chance of discovering something illegal. Id.

Tracing the purpose and history of the probable cause and warrant clauses of the Fourth Amendment, the Ninth Circuit noted that search warrants are not a substitute for the requirement of probable cause. A warrant is to provide a second level of protection in addition to probable cause. See United States v. United States District Court, 407 U.S. 297, 316 (1972). The Ninth Circuit found that the "warrant of inspection" in this case failed to provide either level of protection, for there was

neither probable cause, reasonable suspicion to believe the vehicles in these cases were involved in illegal activity, nor did the warrant interpose the independent judgment of the magistrate. In fact, no reason was put forward below why any of the respondents were subjected to the selective treatment at the checkpoint. The warrant acted as a carte blanche authorization for Border Patrol officers to stop any and all cars and detain them for interrogation of the occupants at the whim of the officers. This warrant is nothing more than the rubber stamp warrant condemned in Aguilar v. Texas, 378 U.S. 108, 111 (1964).

Whatever the utility or constitutionality of inspection warrants as outlined in Justice Powell's concurring opinion in Almeida-Sanchez, the warrant in this case in no way met Justice Powell's standards set forth at 413 U.S. 283-284 of Almeida-Sanchez. When these standards are measured by the facts of this case, the patent unconstitutionality of this "warrant" is made plain:

1) The frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area. Id. at 283. As the court below found, "the frequency with which illegal aliens pass through the San Clemente checkpoint is far too low to make the operation of a checkpoint reasonable. During the effective period of the warrant of inspection, only 0.12% of the passing cars were found to contain "illegal" aliens. Other considerations aside, that minuscule fraction alone would render the checkpoint operation unreasonable." Martinez-Fuerte, supra at 321.

2) The proximity of the area in question to the border. Almeida-Sanchez at 284. The Ninth Circuit found that "the San Clemente checkpoint is 66 miles from the border. Surely, Justice Powell envisioned roving patrols much nearer the border. In any event, we think 66 miles is too far away, particularly where the checkpoint is located on an interstate highway which is the major traffic artery between the two largest cities in California, an artery that carries many million cars each year." Martinez-Fuerte, supra at 321.

3) The extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use. Almeida-Sanchez, supra at 284. The Ninth Circuit opinion below considered the geographic characteristics relevant in determining whether there was an essential nexus with the border. In this case, the Ninth Circuit found there was no such nexus especially in light of Justice Powell's concern for the "vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities--by virtue of their isolated character--for the smuggling of aliens." Almeida-Sanchez, supra at 284 n. 4.

4) The probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area. Id. In Martinez-Fuerte, the court below found "the probable, indeed actual, degree of interference with the rights of innocent persons at the checkpoint is intolerable. Roughly 999 of every 1,000 cars passing the checkpoint carry only persons who are lawfully within the country and under Carroll, supra, 'entitled to use the public highways [and] have a right to free passage without interruption.' . . . We cannot countenance the cumulative intrusion of stopping 10 million cars per year where only one out of every 1,000 passing cars may contain aliens illegally within the country." Martinez-Fuerte, supra at 322.

CONCLUSION

As this nation approaches its bicentennial celebration of independence, it is ironic that the Government presents the Supreme Court of the United States with a certiorari petition requesting the constitutionalization of a general warrant procedure which grants Border Patrol agents unbridled discretion to stop over 10 million motorists a year on an interstate freeway to select certain targets for subsequent removal from the freeway and interrogation. In Boyd v. United States,

116 U.S. 616 (1886) this Court reviewed the history of the general warrant and its impact on events leading up to the adoption of the Fourth Amendment. The "warrant of inspection," found unconstitutional below, is directly analogous to the general warrants and writs of assistance made illegal by the Fourth Amendment.

If there is to be a use for the warrant system envisioned by Justice Powell, then the supporting concept of the functional equivalent of probable cause or reasonable suspicion must be both functional and equivalent. Here, the Government argues that the San Clemente checkpoint offers an equivalency to the probable cause concept. Yet, the return on this warrant established that only one out of every 1,000 cars passing through the checkpoint possibly contained illegal aliens. This is not an area-wide equivalent of probable cause; it is a new concept which would be more accurately termed "remotely possible cause." Charles Gordon, General Counsel for the Immigration and Naturalization Service, suggested the obvious location for an area warrant--"a backroad near the border." Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary of the House of Representatives, 93d Cong. 1st Sess., 22 (1973). It is near the border where the border patrol's enforcement mandate is strongest and where the concept of "functional equivalency" may have its place. San Clemente, California, directly north of nineteen Southern California cities is not the proper place for such activity.

In Ortiz and Brignoni-Ponce, several Justices of this Court noted that the law enforcement problem in this area is made almost impossible because of the void of legislation making it illegal to hire illegal immigrants. A Ninth Circuit jurist noted this ironic state of affairs over 21 years ago: ". . . employment of . . . aliens is primarily responsible for the whole Mexican alien problem." Herrera v. United States, 208 F.2d 215, 218 (9th Cir. 1953) (Pope concurring).

If there is to be any meaningful solution to the problem, it rests with Congress and the Executive to eliminate the irresistible magnet of employment for the Mexican national. However, if the special interests in the United States, which benefit from exploitation of illegal aliens, succeed in preventing passage of needed legislation, this Court should not be asked to dismantle the Fourth Amendment to create for law enforcement carte blanche powers through area inspection warrants in order to ferret out illegal aliens within the borders of the United States. The warrant of inspection issued below contravenes all of this Court's Fourth Amendment teachings. As Justice Stewart stated in Sanford v. Texas, 379 U.S. 476, 486 (1965):

> "The indiscriminate sweep of that language [in the warrant] is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history."

It is therefore respectfully submitted that the Government's petition for a writ of certiorari should be denied.

Respectfully submitted,

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